

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHUKWUEMMEKA O. EZIOLISA,

Defendant.

Case No. 3:10-cr-39

Also Case No. 3:11-cv-236

Judge Thomas M. Rose

Magistrate Judge Michael R. Merz

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**ORDER OVERRULING EZIOLISA’S OBJECTIONS (DOC. 87) TO THE  
REPORT AND RECOMMENDATIONS; OVERRULING EZIOLISA’S  
OBJECTIONS (DOC. 88) TO THE SUPPLEMENTAL REPORT AND  
RECOMMENDATIONS; ADOPTING THE MAGISTRATE JUDGE’S  
REPORT AND RECOMMENDATIONS (DOC. 80) AND SUPPLEMENTAL  
REPORT AND RECOMMENDATIONS (DOC. 83) IN THEIR ENTIRETY;  
DISMISSING EZIOLISA’S MOTION TO GRANT § 2255(f)(4) (DOC. 77)  
WITH PREJUDICE; DENYING ANY REQUESTED CERTIFICATE OF  
APPEALABILITY; CERTIFYING THAT ANY APPEAL OF EITHER THE  
REPORT AND RECOMMENDATIONS OR SUPPLEMENTAL REPORT  
AND RECOMMENDATIONS WOULD BE OBJECTIVELY FRIVOLOUS  
AND TERMINATING THIS CASE**

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This matter is before the Court on the Objections (Docs. 87, 88) filed by Defendant Chukwuemmeka O. Eziolisa (“Eziolisa”) to the Magistrate Judge’s Report and Recommendations (Doc. 80) and Supplemental Report and Recommendations (Doc. 83), both of which recommended that Eziolisa’s “Motion to Grant § 2255(f)(4)” (Doc. 77) be denied. The Magistrate Judge further recommended that, as reasonable jurists would not disagree with the denial of Eziolisa’s motion, Eziolisa should be denied a certificate of appealability and the Court should certify to the Sixth Circuit that any appeal would be objectively frivolous and Eziolisa should not be permitted to proceed *in forma pauperis*. (Doc. 83 at 2-3.)

As stated below, the Court overrules Eziolisa's Objections (Doc. 87) to the Report and Recommendations and Objections (Doc. 88) to the Supplemental Report and Recommendations. The Court adopts the Report and Recommendations (Doc. 80) and Supplemental Report and Recommendations (Doc. 83) in their entirety and denies Eziolisa's "Motion To Grant § 2255(f)(4)" (Doc. 77).

### **BACKGROUND**

On January 30, 2015, Eziolisa filed the "Motion To Grant § 2255(f)(4)," which is now before the Court. (Doc. 77.) On February 2, 2015, Magistrate Judge Merz entered an Order For Response requesting that the United States of America ("United States") respond to Eziolisa's motion stating (1) whether the United States objects to the Court's treatment of the motion as a motion for relief from judgment under Fed. R. Civ. P. 60(b), and (2) if not, any objections the United States has to the granting of relief from the prior judgment and this Court's proceeding to consider Eziolisa's ineffective assistance of counsel claims on the merits. (Doc. 78.) On February 12, 2015, the United States filed a response to Eziolisa's motion stating it does not object to the Court's treatment of the motion as a Rule 60(b) motion, and objecting to the motion and Eziolisa's ineffective assistance of counsel claims as meritless. (Doc. 79.)

On February 18, 2015, Magistrate Judge Merz entered the Report and Recommendations, which recommended that Eziolisa's motion – which he construed as a Rule 60(b) motion for relief from judgment – be denied. (Doc. 80.) Eziolisa did not file objections to the Report and Recommendations within the time permitted by Fed. R. Civ. P. 72(b). Instead, on March 4, 2015, Eziolisa filed a reply brief addressing the United States' response to his motion. (Doc. 81.) On March 10, 2015, this Court entered a Recommittal Order directing Magistrate Judge Merz to reconsider Eziolisa's motion in light of the arguments contained in his reply brief. (Doc. 82.)

On March 11, 2015, Magistrate Judge Merz entered the Supplemental Report and Recommendations, which again treated Eziolisa's motion as a Rule 60(b) motion for relief from judgment and recommended that the motion be denied. (Doc. 83.)

On March 23, 2015, Eziolisa filed a Motion To Vacate Magistrate Judge's R & R For Lack Of Service Upon Movant Eziolisa ("Motion to Vacate for Lack of Service"). (Doc. 84.) In that motion, Eziolisa stated that he was not served with the Report and Recommendations and asked that the Court vacate and re-issue the Report and Recommendations so that he could respond with his objections. (*Id.* at 2-3.) On March 23, 2015, Magistrate Judge Merz denied the Motion to Vacate for Lack of Service, but remedied the service issue by extending the time for Eziolisa to respond to both the Report and Recommendations and Supplemental Report and Recommendations to April 15, 2015. (Doc. 85.)

On April 14, 2015, Eziolisa mailed his Objections (Doc. 87) to the Report and Recommendations and Objections (Doc. 88) to the Supplemental Report and Recommendations, which were then entered in the docket on April 21, 2015. The Court deems Eziolisa's Objections timely filed pursuant to the "mailbox rule." *Houston v. Lack*, 487 U.S. 266, 276 (1988); *Brand v. Motley*, 526 F.3d 921, 925 (6th Cir. 2008). The time to respond to Eziolisa's Objections has expired. The Report and Recommendations and Supplemental Report and Recommendations on Eziolisa's "Motion To Grant § 2255(f)(4)" are therefore ripe for this Court's review.

### **REVIEW**

As required by 28 U.S.C. § 636(b) and Federal Rules of Civil Procedure Rule 72(b), the District Judge completed a *de novo* review of the record in this case. Although Eziolisa labeled his filing a motion pursuant to 28 U.S.C. § 2255(f)(4), the motion argues that the Court improperly denied a previous motion that he filed pursuant § 2255. Accordingly, Magistrate Judge Merz

treated Eziolisa's motion as a motion for relief from judgment under Fed. R. Civ. P. 60(b). (Doc. 80 at 2, citing *Gonzalez v. Crosby*, 545 U.S. 524 (2005).) Neither Eziolisa nor the United States object to the treatment of Eziolisa's motion as a Rule 60(b) motion. (Doc. 87 at ¶ 3 (Eziolisa); Doc. 88 at ¶ 4 (Eziolisa); Doc. 79 at 2 (United States).)

Upon review, the Court finds that Eziolisa's Objections (Doc. 87) to the Report and Recommendations and Objections (Doc. 88) to the Supplemental Report and Recommendations are not well-taken, and they are hereby OVERRULED. The Magistrate Judge's Report and Recommendations (Doc. 80) and Supplemental Report and Recommendations (Doc. 83) are ADOPTED in their entirety.

### **CONCLUSION**

The Court overrules Eziolisa's Objections (Doc. 87) to the Report and Recommendations and Objections (Doc. 88) to the Supplemental Report and Recommendations. The Court adopts the Report and Recommendations (Doc. 80) and Supplemental Report and Recommendations (Doc. 83) in their entirety, and hereby denies Eziolisa's "Motion To Grant § 2255(f)(4)" (Doc. 77). In addition, for the reasons stated in the Report and Recommendations and Supplemental Report and Recommendations, the Court denies any request for a certificate of appealability and certifies to the Sixth Circuit that any appeal of either the Report and Recommendations or Supplemental Report and Recommendations would be objectively frivolous and Eziolisa should not be permitted to proceed *in forma pauperis*.

**DONE** and **ORDERED** in Dayton, Ohio, this Thursday, May 21, 2015.

s/Thomas M. Rose

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THOMAS M. ROSE  
UNITED STATES DISTRICT JUDGE